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No.

Supreme Court of the United States

October Term, 1996

BONNIE LAMVERMEYER
Petitioner,

v.

DENISON UNIVERSITY, ET AL.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

with Appendix

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QUESTION PRESENTED

Whether misconduct caused by a disability protected under the Americans with Disabilities Act must, absent undue hardship, be reasonably accommodated by an employer?

LIST OF PARTIES

The parties to the proceedings and in this Court are Petitioner Bonnie Lamvermeyer, a disabled employee who was terminated from employment, the plaintiff-appellant below, and Respondents Denison University, plaintiff's employer, and Michelle Myers, President of Denison University, and Walter G. Alpaugh, Mary Jane Armacost, David H. Bayley, Ronald S. Beard, William G. Bowen, Charles A. Brickman, Robert H. Castellini, Mark F. Dalton, Henry W. Dove, Wallace H. Dunbar, Michael D. Eisner, Janet Waugh Halliday, Margaret M. Healy, W. August Hillenbrand, David J. Hooker, Margaret Kendrick Hostetter, Charlotte Power Kessler, John D. Lowenberg, Senator Richard G. Lugar, William T. McConnell, Joseph E. McMahon, Malcolm A. McNiven, Jane E. Milbourn, Louis A. Mitchell, Robert B. Nicholas, John J. O'Neill, John W. Phillips, Donald B. Shackelford, John N. Taylor, and Joseph H. Thomas, members of the Board of Trustees of Denison University, the defendants-appellees below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED . . .3

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT . . .16

CONCLUSION 25

APPENDICES:

Memorandum Opinion, U.S. Court of Appeals for the Sixth Circuit, filed 6/6/97 1-3

Memorandum and Order, U.S. District Court for the Southern District of Ohio, filed 3/31/96 4-25

ABC News Transcript #2213, World News Tonight with Peter Jennings, aired 1/17/92 26-41

TABLE OF AUTHORITIES

CASES **PAGE**

Ambrosino v. Metropolitan Life Ins. Co., 899 F.Supp. 438 (N.D.Cal 1995) . . . 17

Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995) 19, 20, 23

Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) 19, 20, 23

Grimes v. U.S. Postal Serv., 872 F.Supp. 668 (W.D.Mo. 1994) . . . 18

Guice-Mills v. Derwinski, 967 F.2d 794 (2nd Cir. 1992) 18

Little v. FBI, 1 F.3d 255 (4th Cir. 1993) . . . 19, 23

Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995) . . *passim*

Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992) . . . 19

Taub v. Frank, 957 F.2d 8 (1st Cir. 1992) 20

Teahan v. Metro-North Commuter R. Co., 951 F.2d 511(2nd Cir.), *cert. denied*, 113 S.Ct. 54 (1992)*passim*

Vande Zande v. Wisconsin Dep't. of Admin., 44 F.3d 538 (7th Cir. 1995) 18

Williams v. Widnall,
79 F.3d 1003 (10th Cir. 1996) . *passim*

STATUTES

29 U.S.C. § 706(8)(C)(i) 22

29 U.S.C. § 706(8)(C)(v) 21

42 U.S.C. §12101(b)(1) 22

42 U.S.C. §12112(b)(5)(a) 23

42 USC § 12114(c)(4) . . . . . *passim*

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

Petitioner Bonnie Lamvermeyer respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 6, 1997.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Sixth Circuit are not reported. They have been reprinted in Appendix A. The judgment and opinion of the United States District Court for the Southern District of Ohio are also not reported. They have been reprinted in Appendix A.

JURISDICTION

This action arose under the Americans with Disabilities Act, 42 USC § 12111, and the Rehabilitation Act of 1973, 29 USC § 794, and jurisdiction was vested in the United States District Court for the Southern District of Ohio by 28 USC § 1343(4). A charge affidavit had been timely filed with the Equal Opportunity Employment Commission (EEOC) on September 13, 1993, and a right-to-sue letter was issued by the EEOC on December 7, 1993. A civil action was then timely commenced on January 18, 1994.

Defendant-respondent filed a Motion for Summary Judgment on May 2, 1995. The United States District Judge granted the Motion for Summary Judgment on March 31, 1996 as to plaintiff-petitioner's claims under the Americans with Disabilities Act

and Rehabilitation Act and dismissed the pendent state law claims without prejudice.

Pursuant to 28 USC § 1291, the Court of Appeals for the Sixth Circuit had jurisdiction over the appeal filed on April 26, 1996. Upon a three paragraph opinion, a panel of the Court of Appeals for the Sixth Circuit entered an order on June 6, 1997 affirming dismissal.

This Court's jurisdiction arises under 28 USC §1254.

STATUTORY PROVISIONS INVOLVED

42 USC §12111(8), (9), (10)

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written

description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters,

and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 USC §12112(a), (b)(5)(A)

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

As used in subsection (a) of this section, the term "discriminate" includes—

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such

covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 USC §12114(c)(4)

A covered entity may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

STATEMENT OF THE CASE

The facts pertinent to this Petition can be briefly stated and were not disputed for purposes of Respondents' summary judgment motion. A tenured professor suffered from psychological disabilities for which she was over-medicated. As the University's own psychiatrist conceded, a point confirmed by three other experts, misconduct involving submission of inaccurate expense vouchers was caused by the effect of this over-medication. Although she could and

did teach effectively and conduct herself professionally once she received proper treatment for her disabilities, the University terminated her for moral delinquency in submitting the vouchers.

Employed as an assistant professor of biology in 1978, Dr. Lamvermeyer gained tenure from Denison University in 1984. *See* District Court Opinion, Appendix at A-5. Soon thereafter, she began suffering panic attacks as a result of the stress of the tenure process. *Id.* Aware of her problems, Janet Hyde, university provost, recommended Dr. Brian Glynn to Dr. Lamvermeyer. *Id.* at A-6.

Dr. Glynn diagnosed Professor Lamvermeyer as suffering from a panic disorder and from agoraphobia. He prescribed the medications, Nardil and Xanax[1], to treat her condition. *Id.* at A-7. Under Dr. Glynn's treatment, her panic attacks ended in approximately March 1987. *Id.* at A-7. She stopped

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[1] Xanax is a powerful prescription drug also known as alproselam. It came on the market in 1981 and, in 1995, 22 million prescriptions for it were filled as documented in "World News Tonight with Peter Jennings, " (January 17, 1992) and "20/20," (July 26, 1996) at Appendix A-26.

taking the prescription medications at that time.

In approximately 1990, she suffered another series of panic attacks. This condition prevented her from doing the everyday tasks that most individuals take for granted. At times, it would confine her to her bedroom. *Id.* at A-7.

Professor Lamvermeyer sought the help of Dr. Glynn again; however, he was moving his practice out of state. She instead went to Dr. Eric Kahn and met with him in September 1990. *Id.* at A-7. Dr. Kahn concluded that she was having a recurrence of the panic attacks and agoraphobia. To combat this, he prescribed high dosages of Xanax in order to avoid the drug, Nardil, and its dietary limitations. Dr. Kahn was willing to prescribe as much as 10 milligrams of Xanax per day.

After two months of treatment and little success, Dr. Kahn increased the initial prescribed dosage of Xanax to 5 milligrams per day. He also lifted his ban on Nardil. During the several months that she took Nardil, Professor Lamvermeyer complained of difficulties with complex, creative thinking, organizing her work as well as dizzy spells. In response, Dr. Kahn introduced Lithium

to help sharpen her thinking and alleviate other negative side effects. *Id.* at A-7. The Lithium failed to correct the problem and brought with it other side effects including temporary loss of speech and temporary inability to use one arm and one leg and then the other arm and leg. *Id.* at A-8.

Dr. Kahn permitted Dr. Lamvermeyer to use her discretion when taking the medications, taking more when needed and taking little or none when she was feeling well.

During her treatment with Dr. Kahn from approximately September 1990 until September 1992, Professor Lamvermeyer submitted requests for reimbursement for job-related expenses to the University. *Id.* at A-9. While under the intoxicating effects of potent prescriptions and inconsistent medications, Dr. Lamvermeyer submitted requests for reimbursement which were inaccurate and resulted in an investigation of the requests.

In the summer of 1992, the University began its investigation into the requests for reimbursement. Several meetings were held among Professor Lamvermeyer and university officials including Charles Morris, provost, and President Michelle Myers. Dr. Lamvermeyer informed the officials of her

problems with panic attacks and the medications used to treat her condition. *See Id.* at A-13. She suggested that they contact her psychiatrist for more information.[2] *Id.* at A-9.

During one of these meetings, Provost Morris suggested that she consider taking long-term disability leave without the possibility of future

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[2]After the 1990-1991 school year, and prior to any investigation of Professor Lamvermeyer's requests for reimbursement, Dr. Lamvermeyer informed Provost Charles Morris in writing of her medical problems and invited him to contact Dr. Kahn. In her letter, she states, "I've had some recent medical problems which has [sic] resulted in some EKG's and eventually my being placed on lithium carbonate treatment during the time since graduation which has resulted in numerous side effects including tremors, nausea, weakness in the limbs, and an inability to concentrate for extended periods. Synthetic thinking is very difficult I've found. This has resulted in a delay in my completion and submission of my annual report to you . . . . Please feel free to call the following specialist [Dr. Eric Kahn] if you need to verify my statements." Despite Lamvermeyer's entreaty, Morris never contacted Dr. Kahn. Record at 493.

All Record references are to the record as filed by the Petitioner in the United States Court of Appeals for the Sixth Circuit and is referred to here as "Record at __."

reinstatement: "[T]he intent of my idea was to remove Bonnie permanently . . . ." Professor Lamvermeyer refused and the meeting ended.

Morris later decided that she should not teach during the fall semester of that school year. He refused to consider her emotional disorder and medications as a possible cause of the inaccuracies on the vouchers and refused to contact her psychiatrist as suggested by Dr. Lamvermeyer.

At a final meeting at the end of August, Myers and Morris informed Dr. Lamvermeyer of the University's decision not to allow her to teach during the fall semester. Myers also advised her that her future options were equally limited: resign or be terminated.

Dr. Lamvermeyer discontinued treatment with Dr. Kahn and sought the help of Dr. Steven Gemma. *Id.* at A-8. After evaluating her, Dr. Gemma reported that benzodiazepines, including Xanax, and Lithium had had an effect on her memory and concentration.

The University did allow Professor Lamvermeyer to teach during the spring semester and she performed remarkably well.

In May 1993, the president's Advisory Board held a hearing to review

the vouchers and determine whether Dr. Lamvermeyer should be removed from employment because of "moral delinquency." *Id.* at A-10. According to Dr. Michael Gordon, Chair of the Advisory Board, the issues were whether Lamvermeyer had submitted the vouchers and whether she was responsible for the inaccuracies thereon. The board did not consider her disabilities or medical treatment in determining her responsibility for the inaccurate vouchers. *See Id.* at A-11, A-14.

The University employed a psychiatrist, Dr. Howard Sokolov, to evaluate what role Dr. Lamvermeyer's medications may have played in the submission of inaccurate expense vouchers. Dr. Sokolov reported:

> It is also my opinion that the types of medication and dosages which she was taking, particularly the Xanax, is probably the cause of her unintentionally creating the inaccurate expense vouchers as alleged. While functioning under such heavy medication, she probably, if asked, would have at anytime indicated that it was wrong to submit inaccurate expense vouchers. However, while

> creating these vouchers, it did not appear, to the best of her impaired recollection, that she was doing anything wrong.
>
> * * * * *
>
> While successfully treated at first, she later had to use increasing amounts of medication producing, in my opinion, an anxiolytic amnestic disorder leading to her submission of inaccurate receipts in an attempt to keep up a facade of competence coupled with compulsive personality traits.

Record at 481.

Dr. Gemma and Dr. Allen Levy reviewed Dr. Sokolov's report and were in agreement with his conclusions. District Court Opinion, Appendix at A-15.

Dr. Peter Breggin examined Dr. Lamvermeyer after she was terminated from the University and reviewed the medical records of Dr. Kahn. In his report, he pointed out the high levels of Xanax that Dr. Lamvermeyer took under Dr. Kahn, reaching five milligrams per day within two months of their first session and reaching up to 12 milligrams per day later on in her treatment. "In contrast to these high levels, the recommended dose range for Xanax is 1-4 mg. per day.

The drug should be prescribed at the lowest effective dose for the shortest possible time. It is not recommended for the patient to tailor the daily dose to the daily level of anxiety. Both the high dose and the abrupt daily changes contributed to toxicity."

Furthermore, Dr. Breggin noted that Dr. Kahn prescribed Lithium to sharpen her mental focus without realizing that Lithium can actually add to the mental confusion and cognitive impairment.

He then concluded:

> The several medical evaluations in this case are in basic agreement with me that Dr. Lamvermeyer suffered from impaired function due to anxio-lytic Xanax, that this impaired function caused her to falsify the vouchers, and that she did not intentionally attempt to deceive the university. During 1990-199[2], she suffered from the classic symptoms of Xanax intoxication, which include not only cognitive deficits (e.g., confusion and amnesia), but also impaired judgment, loss of impulse control, and denial and confabulation. These drug-induced adverse reactions combined to cause

her behavior with the vouchers.

* * * * *

Because of the intoxication, she was not ethically, medically, or legally responsible for her abnormal conduct. She was too severely impaired in regard to cognitive function, judgment and impulse control. **Now that she is no longer in-toxicated with Xanax, there is no reason to believe that she would ever repeat this negative behavior.** She should be reinstated at the university.

Record at 89.

Despite the findings of the psychiatrists (that it was more probable than not that Professor Lamvermeyer did not submit the receipts to intentionally defraud the university), Gordon dismissed their testimony because of initial disagreement among them as to whether a disassociative disorder or the medications were the cause of the inaccuracies.

Although the University did not question her competency as a teacher, stated that filling out vouchers was not a significant part of her job duties, and made no finding of deliberate actions, the Board found her morally delinquent in her actions. District Court Opinion,

Appendix at A-11.

After receiving the Advisory Board's recommendation, President Myers recommended to the Board of Trustees that Professor Lamvermeyer be terminated. In making that decision, Myers did not consider Dr. Lamvermeyer's disabilities. The Board of Trustees then terminated her employment. *Id.* at A-11-A-13.

REASONS FOR GRANTING THE WRIT

THE FEDERAL APPELLATE CIRCUITS CONFLICT OVER THE EXISTENCE OF AN EMPLOYER'S DUTY TO REASONABLY ACCOMMODATE, ABSENT UNDUE HARDSHIP, AN EMPLOYEE'S CONDUCT CAUSED BY A DISABILITY PROTECTED UNDER THE AMERICANS WITH DISABILITIES ACT.

The Second Circuit Court of Appeals has held that an employer's termination of an individual because of behavior or conduct that results from the employee's disability is tantamount to termination because of the employee's disability.[3]

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[3] District courts in the Eighth and Ninth circuits have adopted the approach set out by the Second Circuit in *Teahan*. *See Ambrosino v. Metropolitan Life Ins. Co.*, 899 F.Supp. 438 (N.D.Cal 1995); *Grimes v. U.S. Postal Serv.*, 872 F.Supp. 668 (W.D.Mo. 1994)(recognizing defense of

Teahan v. Metro-North Commuter R. Co., 951 F.2d 511(2nd Cir.), *cert. denied*, 113 S.Ct. 54 (1992) (finding that termination because of absenteeism resulting from an employee's alcoholism was termination because of the alcoholism itself). The Second Circuit has also taken the same approach with regard to medications used to treat an underlying disability and refused to separate the side effects caused by those medications from the underlying disability for purposes of reasonable accommodation. *Guice-Mills v. Derwinski*, 967 F.2d 794 (2nd Cir. 1992)(finding that employer must reasonably accommodate employee's inability to arrive to work on time because of side effects of medication regime). The Seventh Circuit has followed this holding. *See Vande Zande v. Wisconsin Dep't. of Admin.*, 44 F.3d 538 (7th Cir. 1995)(finding that intermittent impairment that is characteristic manifestation of disability is part of underlying disability and hence condition that employer must reasonably accommodate); *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992) (finding that employer must reasonably accommodate

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drug addiction to charges of misconduct).

employee's medication regime that caused drowsiness at work).

Adhering to its decision in *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), the Sixth Circuit explicitly rejected *Teahan* and distinguished between discharging Professor Lamvermeyer because of her disability and discharging her because of alleged misconduct[4] inextricably intertwined with that disability. That distinction has been adopted by five other appellate circuits.[5] *See Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995); *Little v. FBI*, 1 F.3d 255 (4th Cir. 1993); *Taub v. Frank*, 957 F.2d 8 (1st Cir. 1992). Under *Lamvermeyer* and *Maddox* and the line of

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[4]Under the effect of the various medications, Dr. Lamvermeyer had no memory of filling out the requests for reimbursement.

[5]The Equal Employment Opportunity Commission has released a guidance on psychiatric disabilities under the ADA effective March 27, 1997. The EEOC appears to adopt the holding in *Maddox* unless the employer was aware of the employee's disability.

cases joining *Maddox*, the courts do not require a reasonable accom-modation even if the misconduct or conduct is caused by the disability and/or directly related to the disa-bility, apparently inferring an undue hardship or exempting employers from the statutory accommodation requirement without the employer adducing any evi-dence to support undue hardship or an exemption. Conflict exists among at least the First, Second, Fourth, Sixth, Seventh, Tenth and Eleventh circuits on this issue and this court should grant review to achieve its resolution.

A number of these decisions are now reconcilable with the general duty to accommodate absent undue hardship an employer's disability because they involved illegal drug use or alcoholism exempted by the ADA. *See Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995); *Little v. FBI*, 1 F.3d 255 (4th Cir. 1993); *Taub v. Frank*, 957 F.2d 8 (1st Cir. 1992). Stretching that statutory exemption to cover legal drug use results in an emasculation of 42 USC § 12114(c)(4) which limits an employer's ability to ignore the role alcoholism and

drug abuse play in misconduct. The exaggeration of the statute strips individuals with disabilities besides alcoholism and drug addiction of the protections of the ADA.

Petitioner requests the Court to review the conflict existing among the circuit courts of appeal so that uniformity in the law exists for claimants under the Americans with Disabilities Act and Rehabilitation Act.

DISTINGUISHING THE CONSEQUENCES OF AN EMPLOYEE'S DISABILITY LEGALLY PERMITS AN EMPLOYER TO AVOID REASONABLE ACCOMMODATION MANDATES OF THE STATUTE AND SIGNIFICANTLY DIMINISHES THE PLAIN LANGUAGE OF THE AMERICANS WITH DISABILITIES ACT.

In 42 USC § 12114(c)(4) of the Americans with Disabilities Act, Congress permitted employers to discipline alcoholics and illegal drug users in the same manner it would punish non-disabled employees guilty of the same or similar misconduct. [6] In doing so, employers

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[6] Similar provisions are contained within the Rehabilitation Act of 1973. 29 USC § 706(8)(C)(v) provides: "[I]ndividuals with a disability" does not include any individual who is an alcoholic whose current use of alcohol

would not have to consider whether a reasonable accommodation was available. Aware of other behavioral disorders, Congress instead limited this exception to the general duty of an employer to provide a reasonable accommodation to alcoholics and users of illegal drugs. Despite the clarity of the statute, the federal appellate courts suffer from confusion on the breadth of the statutory provision. Those appellate courts that have extended the statute beyond its plain language to deny the protections of the ADA to other individuals with disabilities (non-alcoholics and non-users of illegal drugs) have gone beyond the statute's parameters and subverted the purposes of the ADA.

The primary purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 USC §12101(b)(1). Under the Act, qualified individuals with

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prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to the property or safety of others. 29 USC § 706(8)(C)(i) encompasses illegal drug use.

disabilities are entitled to reasonable accommodation of their disabilities. 42 USC §12112(b)(5)(a). The only exception relevant to the instant case is contained in 42 USC § 12114(c)(4) which eliminates the duty of employers to provide reasonable accommodation to the misconduct of illegal drug users and alcoholics.

Some federal appellate courts have followed the statute and limited the breadth of the exception contained in 42 USC § 12114(c)(4) to illegal drug users and alcoholics. *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995); *Maddox v. University of Tennessee*, 62 F.3d 843(6th Cir.1995); *Little v. FBI*, 1 F.3d 255 (4th Cir. 1993). Other federal appellate courts have gone beyond the statutory language and included individuals with behavioral disorders besides alcoholism and drug abuse. *Lamvermeyer v. Denison University*, Case No. 96-3499 (6th Cir. filed June 6, 1997).

The confusion among the panels arises from a misunderstanding of the intent of Congress as to the coverage of the ADA. A qualified individual is one who can perform the essential functions

of the position with or without reasonable accommodation. Such individual is entitled to the protection of the Act; that being reasonable accommodation and freedom from discrimination. Many appellate courts have read into the statute the essential function of an employee's honesty vis-à-vis the employer. Although such a reading is legitimate, the courts assume that all "misconduct" is not disability-related and therefore dishonest *per se*. By doing so, the courts are themselves guilty of violating the primary prohibition of the Act: failing to consider the individual's disability, its limitations, and whether it can be reasonably accommodated.

In *Lamvermeyer*, the Sixth Circuit purportedly relying upon *Maddox*, extended the holding in that case and thus went beyond the limits of 42 USC § 12114(c)(4) when it held that termination for misconduct attributable to other disabilities besides drug and alcohol abuse is not termination solely by reason of the disability. Without considering the causes of the alleged misconduct, it improperly deemed the behavior misconduct and thus precluded any consideration into whether a reasonable accommodation existed as mandated by the ADA.

Not all disabilities can be lumped

together with alcoholism and drug-abuse; *Lamvermeyer* provides the epitome. A disabled individual, rendered intoxicated by high dosages of prescription medication, makes mistakes on requests for reimbursement and submits them to the University while in a prescription drug induced stupor. As misconduct implies an accompanying evil mind, no misconduct occurred as no intent to defraud the employer existed. This case falls outside the limitations set forth in 42 USC § 12114(c)(4) and the Sixth Circuit erred when it extended the scope of that provision to encompass this case.

This and similar situations call for courts to at least investigate whether a reasonable accommodation is available. An indiscriminate application of 42 USC § 12114(c)(4) to cases involving non-alcoholics and non-users of illegal drugs precludes such an application and subverts the purpose of the ADA: the elimination of discrimination against individuals with disabilities.

CONCLUSION

This Petition seeks resolution of a conflict in the federal appellate circuits over whether disability-related

misconduct triggers the ADA duty of making a reasonable accommodation absent an undue hardship. A judicially created exemption creates an even broader defense that jeopardizes statutory protection whenever an employee engages in disability-related misconduct.

For these and the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Sixth Circuit to review the questions presented by this Petition.

Respectfully Submitted

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APPENDICES

Memorandum Opinion, U.S. Court of Appeals for the Sixth Circuit, filed 6/6/97 1-3

Memorandum and Order, U.S. District Court for the Southern District of Ohio, filed 3/31/96 4-25

ABC News Transcript #2213, World News Tonight with Peter Jennings, aired 1/17/92 26-41

FILED JUNE 6, 1997
LEONARD GREEN, CLERK

NOT RECOMMENDED FOR PUBLICATION

No. 96-3499
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BONNIE LAMVERMEYER,	)	
	)	
Plaintiff-Appellant	)	
	)	**ON APPEAL** FROM THE
	)	UNITED STATES
	)	DISTRICT COURT
v.	)	FOR THE SOUTHERN
	)	DISTRICT OF OHIO
	)	
DENISON UNIVERSITY,	)	
et al.,	)	**MEMORANDUM**
	)	**OPINION**
Defendants-Appellees	)	

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: NELSON and NORRIS, Circuit Judges; COHN, District Judge.[1]

PER CURIAM. Plaintiff, Bonnie Lamvermeyer, appeals from the order of the district court granting summary judgment to defendants. Plaintiff's lawsuit was predicated upon the Americans With Disabilities Act and the Rehabilitation Act of 1973, as well as state law claims.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of

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[1] The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

the parties, we are not persuaded that the district court erred in granting summary judgment to defendants.

Because the reasoning which supports judgment for defendants has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is affirmed upon the reasoning employed by that court in its Memorandum and Order filed on March 31, 1996.

FILED MARCH 31, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BONNIE LAMVERMEYER,	:
	:
Plaintiff,	:
	:Case C-2-94-46
vs.	:
	:
DENISON UNIVERSITY,	:
ET AL.	:
	:
Defendants.	:

MEMORANDUM AND ORDER

Plaintiff Dr. Bonnie Lamvermeyer filed this action following her termination as a tenured professor of biology at Denison University. Plaintiff contends that, in terminating her employment, defendants violated state and federal statutes which prohibit employers from discriminating against individuals with disabilities, breached her employment contract, and caused her severe emotional distress. Jurisdiction is based on the presence of a federal question; there is no diversity of citizenship among the parties. This matter is before the Court on defendants' motion for summary judgment.

I. Background

Plaintiff's employment with Denison University began in 1978, when she was hired as an associate professor of biology. (December 1, 1994 Deposition of Dr. Bonnie Lanvermeyer, pp. 7-8). In the spring of 1984, plaintiff was awarded tenure[1] and promoted to the position of associate professor of biology, a position she held until the date of her termination. (Id.)

At some point during the mid-1980s, plaintiff began to experience emotional problems. (Id. at 48). These problems manifested themselves during the summer of 1985, when plaintiff first experienced what she later learned was a panic attack. (Id.) While plaintiff was walking between the library and the biology department her arms and legs began to tingle, she became very cold, she felt dizzy and faint, her heart began

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[1] Dr. Michele Myers, President of Denison University, explained that tenure "means that the university is committed to provide a continuous contract to the faculty member unless there is cause to terminate that contract; to not renew that contract. (December 2, 1994 Deposition of Dr. Michele Myers, p. 27). Moral delinquency is one such cause. (Id.)

to race, and she could not breathe. (Id.) According to plaintiff, she felt as if she were dying. (Id.) Thereafter, plaintiff experienced many additional panic attacks, some of which occurred while she was teaching class. (Id. at 53-56). When this happened, plaintiff did not excuse the class but rather asked the class to read for a moment while she excused herself. ((Id.) Because of her panic attacks, plaintiff did not teach during the fall semester of 1985, taking medical leave instead. (Id. at 57). Plaintiff resumed teaching in February 1986. (Id. at 90).

Soon after her first panic attack in 1985 plaintiff sought medical treatment from Dr. Siam Giray. (Id. at 55). Dr. Giray gave plaintiff samples of medications, which, according to plaintiff, made her physically sick without improving her panic disorder. (Id. at 57-60). As a result, plaintiff stopped seeing Dr. Giray and instead sought treatment from Dr. Brian Glynn, a psychiatrist whom Dr. Janet Hyde, then university provost, had recommended. (Id. at 72). Dr. Glynn treated plaintiff for twenty months, from August 1985 until March 1987, during which time plaintiff took Nardil and Xanax, drugs prescribed by Dr. Glynn to treat the physical manifestations of her panic attacks. (Id. at 73-82).

As of March 1987, plaintiff was no longer having panic attacks and was no longer taking Nardil or Xanax. (Id. at 92). Plaintiff was asymptomatic until sometime around 1990, when her panic attacks resumed. (Id. at 95-97). For approximately the next two years she saw Dr. Eric Kahn (she did not go back to Dr. Glynn because he was preparing to leave the area), a psychiatrist who treated her with psychotherapy and the drugs Xanax, Nardil, and Lithium. (Id. at 113, 114, 115, 119, 123). Dr. Kahn prescribed Lithium even though it traditionally had not been used to treat panic attacks because plaintiff was not responding to Xanax or Nardil. (Id. at 133). The Lithium caused plaintiff to have difficulty thinking--she testified that "[i]t was like I was trying to think through a fog." (Id. 134). She experienced other severe side effects as well, such as loss of speech and her ability to use one side of her body, and, as a result, she stopped using Lithium about one year after she began to use it. (Id. at 133-34). The panic attacks continued while plaintiff was under the care of Dr. Kahn. (Id. at 123). The symptoms were the same as before, but the attacks lasted longer. (Id. at 125). Despite this, plaintiff still carried a full teaching load. (Id. at 136). Plaintiff was able to teach, although she was shaky and weak after each panic attack and had difficulty grading papers

and writing letters of recommendation on behalf of students. (Id. at 126, 138).

Sometime after July or August 1992, plaintiff stopped seeing Dr. Kahn. (Id. at 144). In the fall of 1992, plaintiff began treatment with Dr. Steven Gemma, who prescribed progressively smaller doses of Xanax and a new drug, Zoloft. (Id. at 151). Eventually, plaintiff stopped taking Xanax and her panic attacks were brought under control. After seeing Dr. Gemma, plaintiff did not experience any full-blown panic attacks or symptoms of emotional or psychiatric problems. (Id. at 156-57).

During the time plaintiff was experiencing panic attacks, an issue arose concerning certain requests for reimbursement she had submitted. At some point prior to July 31, 1992, Dr. Charles Morris, provost of the university,[2] who knew that plaintiff had been having emotional problems, called plaintiff and asked to meet with her. (Id. at 162;

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[2] Dr. Morris described the provost as the chief academic officer of a college, responsible primarily for the curriculum, the academic program, and personnel policies but also involved in other areas such as strategic planning and student life. (December 2, 1994 Deposition of Dr. Charles Morris, p. 7).

December 2, 1994 Deposition of Dr. Charles Morris, p. 10). Dr. Morris requested the meeting because he had learned from the university's vice-president of finance that plaintiff had sought reimbursement for expenses that she may not have incurred. (December 2, 1994 Deposition of Dr. Charles Morris, pp. 12-14). A meeting was held on July 31, 1992, at which time plaintiff and Dr. Morris discussed the matter. (December 1, 1994 Deposition of Dr. Bonnie Lamvermeyer, p. 167). At this meeting plaintiff saw copies of her requests for reimbursements and accompanying supporting documents, and, although she recognized certain items that had been purchased, she could not recall how the documents came to exist. (Id. at 167, 175).

Thereafter, the university began formal proceedings against plaintiff, notifying her in a letter dated December 1, 1992 from Dr. Michele Myers, president of the university, that a hearing would be held on a charge of moral delinquency pursuant to the procedure set forth in the University Faculty Handbook. (December 1, 1992 letter from Dr. Myers, Exhibit B to Defendants' Motion for Summary Judgment). The letter informed plaintiff that the moral delinquency charge related to her submission of "false expense vouchers for which you received University monies." (Id.) The

letter also listed the eight requests for payment submitted by plaintiff and explained why, in the opinion of the university, the vouchers supporting the requests were false. (Id.)

A hearing was held on May 6, 1993 before a panel comprised of members of the faculty. (May 7, 1993 letter to Dr. Myers, Exhibit E to Defendants' Motion for Summary Judgment). Plaintiff was represented by counsel at this hearing. The next day, after meeting again, the panel members recommended in a letter to Dr. Myers that plaintiff's employment be terminated. (Id.) The panel members arrived at the following conclusions:

> - We conclude that Professor Lamvermeyer did submit false expense vouchers for which she received University monies.
> - We conclude that these submissions constitute acts of moral delinquency.
> - We are not persuaded that her disability and/or medication significantly impaired her ability to make moral judgments. Therefore, we conclude that she is morally responsible for these actions.

(Id.)

In a letter dated May 14, 1993, Dr. Myers informed plaintiff: "I concur with

the Panel that you are guilty of the moral delinquency charges brought against you and that your employment should be terminated." (May 14, 1993 letter to plaintiff, Exhibit F to Defendants' Motion for Summary Judgment). Plaintiff refused an opportunity to resign her employment and instead asked to meet with the Board of Trustee's Executive Committee to restate her position. (May 27, 1993 letter from counsel for plaintiff to counsel for defendant, Exhibit G to Defendants' Motion for Summary Judgment). In making this request for plaintiff, counsel for plaintiff stated that plaintiff "strongly believes that she was not responsible for any falsification of receipts[,] and the expert witnesses support her position. (Id.) On June 29, 1993, the Executive Committee affirmed the hearing panel's recommendation to terminate plaintiff. (June 29, 1993 letter to Dr. Myers, Exhibit H to Defendants' Motion for Summary Judgment). Plaintiff asked the Executive Committee to reconsider its June 29, 1993 decision. (October 18, 1993 letter to plaintiff and her counsel, Exhibit I to Defendants' Motion for Summary Judgment). Both plaintiff and special counsel for the university addressed the Executive Committee in regard to plaintiff's request for reconsideration. (Id.) Thereafter, the Executive Committee unanimously concluded that there was not a sufficient reason to

reconsider its earlier decision or the recommendations of the panel and Dr. Myers, and plaintiff's request for reconsideration was therefore denied. (Id.)

Dr. Myers and plaintiff's colleagues knew that plaintiff had experienced a number of panic attacks while employed at Denison University. (December 2, 1994 Deposition of Dr. Michele Myers, p.24). Dr. Myers also knew that accommodations had been made to assist plaintiff with her teaching. (Id.). Dr. Myers testified:

> From the time that she was tenured at Denison, there were times when she was unable to perform her teaching duties and faculty members in that department, colleagues of Dr. Lamvermeyer's, were asked at times to assist, cover classes for her; some students were asked to get books from the library for her when she couldn't leave her office because she had a panic attack. And all of these accommodations were made for several years during -- long before we got into this situation.

(Id. at 23-24). When asked why the university did not make any accommodations at the time of plaintiff's termination, Dr. Myers testified that

"[t]he termination had nothing to do with the disability from my point of view. The termination had to do with moral delinquency and behaviors that were unacceptable to the university." (Id. at 25).

On January 18, 1994, plaintiff filed suit against Denison University and the members of its board of trustees. Plaintiff alleges that, in terminating her employment for the reason given, defendants discriminated against her on the basis of her disability or handicap, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 (first claim for relief), the Rehabilitation Act of 1973, 29 U.S.C. § 794 (second claim for relief), and section 4112.99 of the Ohio Revised Code (third claim for relief). Plaintiff also alleges that defendants breached her employment contract (fourth claim for relief) and that defendants intentionally, recklessly, or negligently caused her severe emotional distress (fifth claim for relief). Plaintiff seeks damages and equitable relief, including reinstatement to her former position with backpay.

Plaintiff strongly asserts that she never intended to defraud the university. She contends--and her expert witnesses agree--that the medication she was taking to control her panic disorder caused her

to create inaccurate information on the vouchers she submitted to the university. One of plaintiff's expert witnesses, Dr. Peter Breggin, concluded that plaintiff was intoxicated by the drug Xanax, a condition evidenced by confusion, amnesia, impaired judgment, loss of impulse control, denial, and confabulation. Plaintiff also contends that almost all of the expenses for which she sought reimbursement were actually incurred and that she can demonstrate this. And she argues that other professors had made similar mistakes on their vouchers but that no action was taken against them.

Nevertheless, plaintiff does not deny that she submitted inaccurate expense vouchers. For example, on June 26, 1991, she submitted a request to be reimbursed for expenses incurred during a trip she took to Atlanta to attend a conference. According to the request form, expenses for lodging at "Almost Home," a private tourist home said to be owned by a woman named Beatrice Tuttle, totalled $200. Supporting this request were four receipts, each showing room charges of $50 and each apparently signed by Beatrice Tuttle. Plaintiff was asked about this in her deposition:

> Q. Have you ever heard of a private tourist home called Almost Home?

A. No, I tried to find that in library records and I can't find anything like that.

Q. Did you come to find out that no such place exists?

A. That is my conclusion.

Q. This is very detailed information; would you agree? It has a specific name, the specific owner, the specific date, the specific person, the specific customer identification. All that is very specific information; would you agree?

A. That information is there.

Q. I mean it is not ambiguous as to the details on these invoices.

A. That's correct.

Q. Do you deny creating those invoices to submit with your -

A. I cannot confirm or deny. I don't know.

(December 1, 1994 Deposition of Dr. Bonnie Lamvermeyer, pp. 270-71). The seven other requests for payment that formed the basis for plaintiff's termination contained similar

discrepancies, which plaintiff could not explain.[3]

II. Legal Standard Government Defendants' Motions

Motions for summary judgment are governed by Fed. R. Civ. P. 56(c), which provides:

> [Summary judgment]...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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[3] Plaintiff did testify at her deposition, however, that the signatures on eight documents labelled "Request for Payment" and prepared during the period from June 26, 1991 through June 3, 1992 (the documents at issue in regard to her termination) were hers or appeared to be hers. (December 1, 1994 Deposition of Dr. Bonnie Lamvermeyer, pp. 180, 192, 199, 222, 228, 235, 241, 245; exhibits 1-8).

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)(emphasis in original); Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984).

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. The purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. Lashlee v. Sumner, 570 F.2d 107, 111 (6th Cir. 1978). Therefore, summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is...[and where] no genuine issue remains for trial,...[for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 467 (1962) (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944)); accord County of Oakland v. City

of Berkley, 742 F.2d 289, 297 (6th Cir. 1984).

In making this inquiry, the standard to be applied by the Court mirrors the standard for what was formerly referred to as a directed verdict. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson, 477 U.S. at 250.

> "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745, n.11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules, which are designed "to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted); accord Adams v. Union Carbide Corp., 737 F.2d 1453, 1455-56 (6th Cir.), cert. denied, 469 U.S. 1062 (1984). Inferences to be drawn from the underlying facts contained in such materials must also be considered in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Watkins v. Northwestern Ohio Tractor Pullers Ass'n, 630 F.2d 1155, 1158 (6th Cir. 1980). Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes, 398 U.S. at 157-60.

If the moving party meets its burden and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The existence

of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 252.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

III. Discussion

To establish a violation of the Rehabilitation Act of 1973, plaintiff must show, among other things, that she was discriminated against solely by reason of her handicap. Maddox v. University of Tennessee, 62 F.3d 843, 846 (6th Cir. 1995).[4] Likewise, because the

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[4] Plaintiff must also show that she is a handicapped person under the Act, that

Americans with Disabilities Act "parallels the protection of the Rehabilitation Act," Maddox, 62 F.3d at 846 n.2, plaintiff must also show under the Americans with Disabilities Act that she was terminated solely by reason of her disability. For the reasons set forth below, the Court determines that there is no genuine issue of material fact concerning whether plaintiff was terminated solely by reason of her handicap or disability.

It is undisputed that plaintiff was found to have engaged in misconduct which, in the opinion of the university's board of trustees, was sufficiently egregious to warrant her termination. It is also undisputed that the board of trustees terminated plaintiff on the basis of its finding of misconduct. As a result, plaintiff cannot demonstrate that defendants terminated her employment solely by reason of her handicap or disability. Defendants are thus entitled to summary judgment on plaintiff's claims under the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

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she is otherwise qualified for the position of associate professor of biology, and that Denison University was receiving federal financial assistance. Maddox, 62 F.3d at 846.

The Court's conclusion on this issue is based on the decisions of the Sixth Circuit in Maddox and Ferby v. United States Postal Service, No. 94-5792, 1995 U.S. App. LEXIS 37079 (6th Cir. Nov. 27, 1995). In Maddox, plaintiff, a former assistant football coach at the University of Tennessee (UT), alleged that he was terminated on the basis of his disability, alcoholism, in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. While employed at UT, plaintiff was arrested and charged with driving under the influence of alcohol. This incident, which was highly publicized, was embarrassing to UT. As a result, after determining that the allegations against plaintiff were accurate, UT notified plaintiff that his employment was terminated. Plaintiff sued UT, contending that his termination was discriminatory on the basis of his alcoholism. There was no dispute, however, that plaintiff had been terminated because of his misconduct. The district court therefore held that UT did not terminate plaintiff solely by reason of his disability, and granted summary judgment in favor of defendants.

The Sixth Circuit stated that the district court was correct in focusing on the distinction between discharging a person for unacceptable misconduct

allegedly caused by his or her disability and discharging the person because of his or her disability. The court then affirmed the grant of summary judgment in favor of defendants, holding that "[e]mployers subject to the Rehabilitation Act and ADA must be permitted to take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled." Maddox, 62 F.3d at 848. In so holding, the court expressly rejected the reasoning of the Second Circuit in Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991), cert. denied, 113 S.Ct. 54 (1992), a decision relied upon by plaintiff in opposing defendants' motion for summary judgment.

The Sixth Circuit subsequently reaffirmed its position that a distinction must be made between conduct and disability. In Ferby, plaintiff, an alcoholic, was terminated following a violent outburst at work, an outburst which, plaintiff contended, was caused by his alcoholism. Plaintiff sued under the Rehabilitation Act of 1973 after his request for reinstatement was denied. The only question was whether plaintiff was denied reinstatement "solely by reason of his handicap," in violation of the Rehabilitation Act. Answering this question in the negative, the Sixth Circuit held that "[a]n employer does not

rely solely on the handicap when it demonstrates that a person is discharged for misconduct, even if the conduct is related to a handicap." Ferby, 1995 U.S. App. LEXIS at *3.

In the present case, there is no dispute that defendants terminated plaintiff for what they determined to be misconduct in connection with certain requests for payment made by her. Under the decisions in Maddox and Ferby, even if plaintiff's conduct was caused by her disability, her termination was not discriminatory under the Americans with Disabilities Act or the Rehabilitation Act of 1973. Defendants, therefore, are entitled to summary judgment on these claims.

IV. Conclusion

The Court GRANTS defendants' motion for summary judgment with respect to plaintiff's claims under the Americans with Disabilities Act and the Rehabilitation Act of 1973, the only claims under federal law presented in this action, and DISMISSES the pendent state-law claims without prejudice. See Gaff v. Federal Deposit Insurance Corp., 814 F.2d 311, 319 (6th Cir. 1987) (as a general rule, when federal issues are dismissed before trial, district courts should decline to exercise pendent jurisdiction over state law claims).

IT IS SO ORDERED.

/s John D. Holschuh
John D. Holschuh, Judge
United States District
Court

ABC NEWS Transcript #2213

Air Date: January 17, 1992

World News Tonight with
Peter Jennings
EST Edition

ANNOUNCER: From ABC, this is World News Tonight with Peter Jennings.

MDBO.JENNINGS: We have a report tonight about a drug that has become the most widely prescribed tranquilizer in the United States. A lot of doctors and their patients are being urged to take a closer look at the drug Xanax. It is used by more than three and a half million Americans and there is growing evidence that many people find it easier to start using Xanax than to stop.
Here's ABC's Karen Burnes.
KAREN BURNES,ABC News:[voice-over] It is touted as a miracle drug: fast-acting, potent, nonaddictive. It is meant to relieve anxiety but patients and doctors say it can do just the opposite.
MARY JANE, Xanax User: I didn't know how I could live without it. You know, I just—I needed those pills.
FRANK, Xanax User: If I'd stayed on them any longer, I'd probably kill somebody. I even tried to kill myself.
BURNES: The people you just heard took Xanax, a drug which is now used four times as much as Valium. Many doctors

say that Xanax can be extremely addicting and withdrawal can be difficult, even more so than Valium. In rare cases, withdrawal from Xanax can be life-threatening.

Dr. KEN ROSENBERG, Cornell Medical Center: Anxiety and depression always occur whenever you stop the drugs.

BURNES: Dr. Ken Rosenberg of Cornell Medical Center is a teacher and consultant on substance abuse.

Dr. ROSENBERG: When someone abruptly stops a drug like Xanax they experience shakes, tremors, even seizures, high blood pressure, tachycardis, sometimes psychosis in which you hear voices or you see imaginary scary things; and in the rare event it can be fatal.

BURNES: [voice-over] ABC News contacted more then 20 drug treatment centers and hospitals across the United States. All of them said that Xanax addiction has become a serious problem affecting people in all walks of life. One doctor described withdrawal from Xanax as "Chinese water torture." Others say it is more prolonged and dangerous than withdrawal from alcohol, cocaine or heroin.

Lyle Jones works in a metals plant. After years on Valium, his doctor prescribed Xanax for stress and depression. For a while he felt better, but then his thoughts turned to suicide and homicide.

LYLE JONES, Xanax User: I thought about killing my wife. That's when I really wanted help. I had the shotgun in my hand. I had to take it back in the house and put it up.

BURNES: [voice-over] Lyle went to Marworth, a drug treatment facility, for help. He was given medication to slowly wean him from the Xanax. Like many people on the drug, Lyle suffered through a tortured withdrawal.

Mr. JONES: I had these cold sweats and the shakes. I'll never forget them. I just had to keep my arms on the table there to pick the food up to get it to my mouth so I wouldn't drop it, you know. That's how bad it was.

BURNES: [voice over] Xanax is classified as safe by the FDA but documents from its drug monitoring program associate it with hundreds of adverse symptoms, including amnesia, convulsions, hallucinations and hostility. Doctors who specialize in addiction warn it's one thing to prescribe medication and another to monitor it.

Dr. NEAL CAPRETTO, Gateway rehabilitation Center: It's easier to give the medication than to talk to somebody. It takes 20 seconds to write a prescription of Xanax; it takes 20 minutes not to.

BURNES: But doctors continue to prescribe Xanax because it is a powerful drug and can be effective in treating anxiety. Upjohn, the manufacturer of Xanax, declined an on camera interview with ABC

but in phone conversations they said, "Xanax is safe if withdrawal is slow and carefully monitored."
Karen Burnes, ABC News, New York
JENNINGS: We'll be back in just a moment.
[Commercial break]

This transcript has not yet been checked against videotape and cannot, for that reason, be guaranteed as to accuracy of speakers and spelling. (DW)
ABC NEWS 20/20 Transcript #1630
July 26, 1996

BARBARA WALTERS: Good evening. I'm Barbara Walters. Hugh Downs is on vacation, and this is 20/20.
ANNOUNCER: From ABC News, around the world and into your home, the stories that touch your life, with Hugh Downs and Barbara Walters, this is 20/20.
Tonight, you won't believe their stories. People hooked on one of America's most prescribed drugs, Xanax.
Dr. JOHN STEINBERG, University of Maryland: I think there was a tremendous failure to perceive the potential danger of this drug.
ANNOUNCER: The perfect prescription to calm your nerves, but it can be dangerous if you're not careful.
1st XANAX USER: I knew I was going insane.

2nd XANAX USER: I shook all the time—all the time.
ANNOUNCER: They were sick, depressed, suicidal, and they were addicted.
3rd MAN: The drug can be dangerous. It can be fatal.
ANNOUNCER: Tom Jarriel with the dangers of a widely used drug. Be warned before you become a victim of the Xanax habit.

* * * * *

The Xanax Habit
BARBARA WALTERS, Anchor: It is more powerful than Valium, trusted by doctors—a drug that helps millions of Americans calm down. But tonight we have a warning about the dark side of the highly popular tranquilizer, Xanax. Every year more than 15 million people use Xanax, believing it is safe and effective—and most often, it is. But there is something about Xanax that not only you, but many physicians may not be aware of. Tom Jarriel heard incredible stories from people who became victims of the Xanax habit.
TOM JARRIEL: It's early morning in Southern California and actress Lani O'Grady is enjoying the tranquillity of the ocean. It's an atmosphere she treasures after the years of turbulence she spent fighting a long, grueling battle.
LANI O'GRADY: The quality of my life had gotten so poor. I was afraid of people. I didn't want to go out of the house.

TOM JARRIEL: Across the country, outside Baltimore, Maryland, elementary school teacher Dottie Dowling [sp] cherishes her quiet moments too, since overcoming a devastating struggle.

DOTTIE DOWLING: I couldn't do simple mental problems. My concentration was affected. I shook all the time—all the time.

TOM JARRIEL: And in western Pennsylvania, Dennis McMahon [sp] revisits the grounds of the Gateway Rehabilitation Center, the place that helped him break the shackles of a powerful tie.

DENNIS McMAHON: I would sleep for two hours and then I'd have to get up, take another pill, then two hours again. Then I'd have to pop it before I went to work.

TOM JARRIEL: While they do not know each other, these three people share a common experience. They all had a brush with death because of a widely prescribed tranquilizer given to them as treatment for their anxiety—a drug called Xanax.

Hailed as the wonder drug for anxiety and panic attacks, Xanax—also known as alproselam [sp]—is a powerful psychiatric drug that came on the market in 1981. Stronger and faster-acting, it soon replaced Valium as the number-one-selling tranquilizer in America. Over 22 million prescriptions were filled just last year alone. But there's another side to this so-called wonder drug, a side that the millions who turn to it,

desperate for help, may not have been aware of.

[excerpt from "Eight is Enough"]

No one would guess that while Lani O'Grady was the vibrant star Mary Bradford in the hit TV series Eight is Enough. She was tormented by a form of severe anxiety known as panic attacks. Year after year she was prescribed a variety of tranquilizers, including Valium, but each time she would find herself addicted. Then a doctor told her about Xanax.

LANI O'GRADY: I was just so excited to hear that there was something that was not addicting that I could take to help me feel normal again.

TOM JARRIEL: [interviewing] Do you remember the doctor saying specifically that the drug was not addictive?

LANI O'GRADY: Oh, he very specifically said that, because I had told him what I'd gone
through with Valium and that I didn't want to repeat that experience. He was very, very clear about it—that it was not an addicting substance.

TOM JARRIEL: But, in fact, Xanax can be addictive, which the drug's manufacturer, the Upjohn Company, alluded to in the advertising fine print. Yet, critics say that a massive marketing campaign and over-eager sales representatives led many doctors to believe that Xanax was safer than the other habit-forming drugs used to treat anxiety and panic. The problems

with Xanax use didn't seem to get communicated through the ads or the sales reps, and doctors were soon reaching for Xanax liberally, prescribing it to their patients to treat every-day stress—and giving it out like candy, some experts say.

Dr. JOHN STEINBERG, Addictions Medicine Specialist, University of Maryland: I think there was a tremendous failure to perceive the potential danger of this drug.

TOM JARRIEL: Dr. John Steinberg [sp] is an addictions medicine specialist at the University of Maryland.

Dr. JOHN STEINBERG: The worst thing about this drug was a failure to perceive how difficult it would be to stop, how intensely people would be attracted to it.

TOM JARRIEL: [interviewing] When did you sense something was wrong?

LANI O'GRADY: When I tried to stop taking it. When I skipped it during the day, I'd start to feel that uncomfortableness that I felt with the Valium withdrawal and I got real frightened. I felt that I was addicted. I felt I had a problem.

TOM JARRIEL: Couldn't you have just said, "I've had enough," and stopped taking Xanax?

LANI O'GRADY: I tried. I had tried to do it with Valium and I had a seizure. And I did it once with Xanax and had a grand mal seizure that they didn't think I

would live through, so I knew that I couldn't just stop.

Dr. SOLOMON SNYDER, Johns Hopkins University: People can become habituated to it, become tolerant to it, so it takes more and more drug to produce the same effect.

TOM JARRIEL: Dr. Solomon Snyder [sp] directs the Department of Neuroscience as a professor of psychiatry and pharmacology at Johns Hopkins University.

Dr. SOLOMON SNYDER: Patients should be told that this an addictive drug and they must be careful not to keep taking it and not to increase the dose.

TOM JARRIEL: Dottie Dowling, who took Xanax to relieve crippling anxiety found that after a while, the drug stopped working. Even with a prescription for eight milligrams a day, her anxiety rebounded with a greater intensity—a potential side effect of Xanax.

DOTTIE DOWLING: And I figured if I was the basket case that I was after eight, I just had to stop. It was working against me.

TOM JARRIEL: How did this happen? Well, early clinical testing of Xanax never went beyond an eight-week trial period, so no one knew what a broad range of potential side effects this drug could have.

Dr. NEIL CAPRETTO, Treatment Director, Gateway Rehabilitation Center: People innocently are put on this medicine and in some cases it works out well.

TOM JARRIEL: Dr. Neil Capretto [sp] is director of treatment for the Gateway Rehabilitation Center in Pennsylvania.
Dr. NEIL CAPRETTO: There is a significant risk and we see it all the time here—many people who have lost many years of their life, lost their jobs, been on the verge of suicide. I'm aware of cases where people have committed suicide.
TOM JARRIEL: Dennis McMahon came very close.
DENNIS McMAHON: I knew I was going insane. By now, I had every horrible thought that you could possibly have, including suicide.
TOM JARRIEL: McMahon, an aircraft dispatcher, suffered from common job-related stress. After a doctor prescribed Xanax, it wasn't long before he got hooked, fell into a deep depression, and contemplated killing himself.
DENNIS McMAHON: I sat at the edge of the bed, I picked up that Luger—I just couldn't do it. I just—I tried through my foggy brain to just think of my family, the fact that if I do this, I will be denied God forever. I just couldn't do it, and then I said, "I'm going to go to the emergency room."
TOM JARRIEL: Were all of these cases simply odd, adverse reactions to this popular drug? To find out, 20/20 conducted an investigation of over 65 hospitals and drug-rehab centers across the country, asking about their

experiences with Xanax. None of the facilities were surprised we were inquiring about problems with Xanax—they had seen them before. Nearly 90 percent reported seeing patients with similar symptoms to the ones we've been hearing about—addiction, depression, hallucination; seizures, suicidal tendencies, and even, in some cases, homicidal tendencies. And many noted that withdrawal from Xanax can be tougher and more dangerous than kicking heroin.

DOTTIE DOWLING: The withdrawal was the combination of the worst physical symptoms I have ever felt.

TOM JARRIEL: After five years on Xanax, and with worse anxiety than ever, Dottie found she couldn't get off the drug. Fearing for her physical and mental health, she checked herself into the Shepard-Pratt Psychiatric Hospital [sp] to detox from Xanax.

DOTTIE DOWLING: And there's the room where I spent my six weeks—that window right there. It was six of the most painful weeks of my life. I was hallucinating. There were headaches, there were chills, there was nausea, and when the physical demons weren't after me, the psychological demons were after me. All I know is that the drug compounded my problem and the drug became my problem.

Dr. NEIL CAPRETTO: Withdrawal can be dangerous. It can be fatal.

TOM JARRIEL: In fact, Dr. Capretto says, that's why many Xanax users end up in hospitals and rehab centers during withdrawal.

Dr. NEIL CAPRETTO: Their heart rate may go up. They may have a seizure. Sometimes body temperature can go up and in some instances it's fatal.

TOM JARRIEL: These and other symptoms were apparent to the agency in charge of overseeing drugs for many years. In these 1989 memos obtained by 20/20, Food and Drug Administration officials cite "excessive cases of hostility, rage, and even actual assaults and murders associated with Xanax use."

The FDA, in 1989, estimated that 60 incidents of "extreme violence" in that year could be linked to Xanax. Federal emergency room data show reactions to Xanax in combination with other substances accounts for nearly 8,000 emergency room visits a year. With the sale of the drug to doctors and pharmacists, Upjohn provides a detailed package insert warning of possible adverse reactions. However, this insert is rarely seen by the Xanax user since it's generally not included with the bottle when a prescription is filled. In some cases, though, patients receive a label like this from a pharmacist which displays a brief, much simpler warning against possible side effects. And, while most experts agree Xanax can be effective when used in cases of anxiety

for short periods of time, the drug, they say, is too often prescribed by doctors who are not psychiatrists and not trained to know the effects of this mind-altering drug on its users. Upjohn, who first developed Xanax, now a generic drug, declined an on-camera interview with 20/20, but said in a written statement, "Upjohn's primary concern is always for the well-being of patients who use are medicines," adding that "Xanax is an important, safe, and effective option for the treatment of clinical anxiety and panic disorder."

Dr. ROBERT DUPONT, Founder, Anxiety Disorders Association of America: I've got experience of having treated patients for a very long period of time on this medicine.

TOM JARRIEL: Upjohn also referred us to Dr. Robert Dupont [sp], a psychiatrist and founder of the Anxiety Disorders Association of America.

Dr. ROBERT DUPONT: I'm not pretending or claiming that Xanax doesn't cause problems for some people. My problem is the people who don't have a problem who are using it within the therapeutic range, who have a good result. I don't want to scare those people.

SANDRA TREPANIER, Psychiatric Patient: It was just tremendous when I first started taking it.

TOM JARRIEL: Sandra Trepanier [sp] is one of Dr. Dupont's patients. Under his supervision, she's been taking Xanax for

over eight years, she says, with favorable results.
SANDRA TREPANIER: It really made my life much—well worth while. It's just something that I need like someone would need glasses to read the paper.
TOM JARRIEL: But those who have suffered have been changed forever. Even though Dottie Dowling's anxiety has now subsided, the sense of loss she feels from her experience with Xanax is profound.
DOTTIE DOWLING: The drug took, all together, five or six years out of my life. Those years are gone and I'll never get them back.
TOM JARRIEL: And even once off Xanax, it took her two years, she says, to get the drug and its effects completely out of her system.
DOTTIE DOWLING: I had total inability to communicate. When I read, I couldn't understand what I was reading. I couldn't do anything.
TOM JARRIEL: But now Dottie does a lot. She's returned to teaching and finds time to volunteer at Shepard-Pratt Psychiatric Hospital, hoping to help others by sharing her story.
LANI O'GRADY: [talking on telephone] Hi, this is Lani O'Grady. Can you—
TOM JARRIEL: Lani, too, has taken her torturous experience with Xanax and turned it into a positive one for others. With the help of a new doctor and therapy, she's living anxiety-free.

She's put acting on the back burner for the moment and works with the psychiatrist that saved her from the throes of Xanax, speaking out against the drug she once embraced.

LANI O'GRADY: Xanax is not worth whatever, whatever you're taking it for, whether it's anxiety or panic, there is another way to get well.

BARBARA WALTERS: Tom, under what circumstances should one therefore take Xanax?

TOM JARRIEL: Barbara, it can be used on a relatively short-term basis which is primarily designed for panic attacks or extreme anxiety. Longer-term use of the drug should be under a doctor's supervision, and very careful supervision. The problem is, so many people are getting it. It's being so liberally prescribed.

BARBARA WALTERS: What's a short period of time?

TOM JARRIEL: Probably three months.

BARBARA WALTERS: Unless the doctor is really on top of it and knows what he's doing—he or she is doing.

TOM JARRIEL: Right.

BARBARA WALTERS: Now, what if you're on it and you want to get off?

TOM JARRIEL: That's the most important moment of all. If you're heavily addicted to this, you're using a great amount of it and decide to stop, you must do it under medical supervision —a rehab center, perhaps—because during that

period, people become very depressed. They can become suicidal. It's a very dangerous period, and no one should tried to do this cold turkey—it could be deadly.

BARBARA WALTERS: Awfully important to know both of these things. Thank you, Tom.

FILED
OCT 7 1997
CLERK

Nº. 97-433

In The

Supreme Court of the United States

October Term, 1996

BONNIE LAMVERMEYER,
Petitioner,

v.

DENISON UNIVERSITY, ET AL.,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION
with Appendix

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QUESTION PRESENTED

Whether, under the Americans with Disabilities Act, an employer may discipline an individual with a disability for violating a workplace conduct standard as it would any other employee, even if the misconduct resulted from a disability.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 4

REASONS THE PETITION SHOULD BE DENIED 5

CONCLUSION 15

APPENDICES:

Memorandum Opinion, U.S. Court of Appeals for the Sixth Circuit, filed 6/6/97 1-3

Memorandum and Order, U.S. District Court for the Southern District of Ohio, filed 3/31/96 4-25

EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, 3/25/97; Question 30 26-31

TABLE OF AUTHORITIES

Page

Bates v. Long Island R. Co., 997 F.2d 1028 (2d Cir. 1993)..... 9, 10

Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995)..... 6

Harris v. Polk County, Iowa, 103 F.3d 696 (8th Cir. 1996)..... 6

Little v. FBI, 1 F.3d 255 (4th Cir. 1993)..... 6

Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995)..... 6

Nisperos v. Buck, 720 F. Supp. 1424 (N.D. Cal. 1989)..... 8

Palmer v. Circuit Court of Cook County, Ill, 117 F.3d 351 (7th Cir. 1997)..... 6, 14

Sedor v. Frank, 42 F.3d 741 (2d Cir. 1994)..... 10

Taub v. Frank, 957 F.2d 8 (1st Cir. 1992)..... 6

Teahan v. Metro-North Commuter R. Co., 951 F.2d 511 (2d Cir. 1991)..... passim

Teahan v. Metro-North Commuter R. Co., 80 F.3d 50 (2d Cir. 1996)..... 7

Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996)..... 6

29 U.S.C. § 791(b) 9

29 U.S.C. § 794(d) 2, 8

42 U.S.C. § 12101 5

42 U.S.C. § 12101(b)(2) 3, 14

42 U.S.C. § 12111 2

42 U.S.C. § 12112(b)(6) 3, 13

42 U.S.C. § 12210 2

42 U.S.C. § 12201-12204 2

EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, issued on March 25, 1997 ..... 11, 12, 13

56 Fed. Reg. 35,733 (1991) 13

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

BONNIE LAMVERMEYER

Petitioner,

v.

DENISON UNIVERSITY, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 794(d)

(d) Standards applicable to complaints. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210) as such sections relate to employment.

(As amended October 29, 1992 . . . .)

42 U.S.C. § 12101(b)(2)

It is the purpose of this chapter -- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

42 U.S.C. § 12112(b)(6).

[T]he term "discriminate" includes --

using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;

STATEMENT OF THE CASE

Respondents rely upon the facts as expressed in the District Court Opinion of the Honorable John D. Holschuh for their statement of the case. At Appendix A-4 through A-16.

SUMMARY OF ARGUMENT

1. There is no explicit conflict between the United States Courts of Appeals on the question presented under the current state of the law. The Second Circuit Court of Appeals case cited by Petitioner for this premise was decided, on questionable authority, prior to subsequent revisions in applicable law, and post-amendment Second Circuit case law is ambiguous as to the issue.

2. The Americans with Disabilities Act and implementing regulations dictate a uniform rule of law recognized and followed by the decisions below.

REASONS THE PETITION SHOULD BE DENIED

A CONFLICT BETWEEN THE UNITED STATES COURTS OF APPEALS ON THE DIRECT QUESTION PRESENTED DOES NOT EXIST.

The Americans with Disabilities Act ("ADA") is a federal statute which prohibits, in relevant part, discrimination in the workplace against individuals with disabilities. 42 U.S.C. § 12101 et seq. It is derived from principles established under the earlier Rehabilitation Act of 1973, which may be considered authoritative precedent for the ADA where relevant. Recognizing that the ADA mandates equality of opportunity rather than special treatment for individuals with disabilities, federal appellate courts considering the issue have confirmed that there is a permissible distinction between taking action adverse to an employee on the basis of misconduct, as opposed to an underlying disability, even if the misconduct arguably

related to the disability in some manner. See, e.g., Palmer v. Circuit Court of Cook County, Ill, 117 F.3d 351 (7th Cir. 1997); Harris v. Polk County, Iowa, 103 F.3d 696 (8th Cir. 1996); Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996); Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995); Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995); Little v. FBI, 1 F.3d 255 (4th Cir. 1993); Taub v. Frank, 957 F.2d 8 (1st Cir. 1992).

Petitioner maintains that the uniform decisions of the United States Courts of Appeals above are in conflict with a 1991 decision by the Second Circuit Court of Appeals under § 504 of the Rehabilitation Act, Teahan v. Metro-North Commuter R. Co., 951 F.2d 511 (2d Cir. 1991). Petitioner's claim of a purported conflict is premature at best. The position of the Second Circuit under post-Teahan amendments to § 504 is unclear. Those amendments, accompanying rulemaking and guidance by the Equal

Employment Opportunity Commission ("EEOC"), and subsequent decisions both within and without that Circuit strongly suggest that any post-amendment holding under the ADA on the identical issue would agree with the uniform rule applied by the other United States Courts of Appeals which have addressed the issue.

The Second Circuit Court of Appeals decided Teahan on December 22, 1991.[1] In 1992, in order to clarify the standards governing federally funded entities, Congress amended § 504 to expressly incorporate the non-discrimination mandate and corresponding liability standards of Title I of the ADA. These amendments became effective October 29, 1992. See Rehabilitation Act Amendments of

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[1] The Second Circuit ultimately revisited the case in the appeal of the original remand. Relevant review, however, was confined to case history. Teahan v. Metro-North Commuter R. Co., 80 F.3d 50 (2d Cir. 1996).

1992, codified at 29 U.S.C. § 794(d). The Teahan court was thus interpreting a pre-amendment, pre-ADA statutory mandate, without the benefit of EEOC rulemaking and guidance on the ADA addressing the precise issue raised by Petitioner.

Teahan was decided under a statute which was subsequently amended in relevant part. Furthermore, a close review of the cases relied upon in Teahan indicates that they are in fact primarily § 501 cases applicable to federal government employees.[2] This is a distinction of significance, due to the fact that § 501 of the Rehabilitation Act imposes an affirmative action mandate upon the federal government which § 504 and the ADA do not. 29 U.S.C.

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[2] See, e.g., Nisperos v. Buck, 720 F. Supp. 1424 (N.D. Cal. 1989) (observing that applicable § 501 regulations require the federal government to be a "model employer of handicapped individuals").

§ 791(b).[3] Accordingly, the Teahan court arguably arrives at the conclusion relied upon by Petitioner in the context of heightened standards of duty which are inapplicable to either the ADA or § 504.

Finally, a more recent decision by the Second Circuit indicates that Teahan is of uncertain vitality. In Bates v. Long Island R. Co., 997 F.2d 1028 (2d Cir. 1993), a § 504 Rehabilitation Act case, one of the plaintiffs claimed that her disability prevented her from calling in and reporting pursuant to the requirements of a leave of absence policy, and that she was thus terminated solely because of her disability. The Bates court distinguished Teahan and found that the plaintiff in question was discharged solely for her

[3] Entitled "Federal agencies; affirmative action program plans."

insubordination in failing to call in rather than her handicap. Bates, 997 F.2d at 1036.[4]

In summary, Teahan should not be considered in conflict with decisions in other Circuits for three reasons. (1) Teahan was decided before statutory amendments became effective in late 1992, which made the employment provisions of Title I of the ADA applicable to such claims. (2) The cases relied upon by the Teahan court dealt with a section of the Rehabilitation Act inapposite to claims raised under Section 504. (3) A more recent Second Circuit decision has distinguished Teahan, thus suggesting that the case would not necessarily be followed should the Second Circuit ultimately visit the precise issue presented under the

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[4] Another post-amendment Second Circuit case, Sedor v. Frank, 42 F.3d 741 (2nd Cir. 1994), relies upon Teahan in a related but more ambiguous context, and does not address the issue of egregious misconduct under the ADA.

ADA. Accordingly, Teahan does not provide the basis for establishing a current conflict between the United States Courts of Appeals on the issue raised in the proceedings below.

THE ADA, IMPLEMENTING REGULATIONS, AND GUIDANCE PROVIDED BY THE EEOC CONSTITUTE DISPOSITIVE AUTHORITY ON THE QUESTION PRESENTED.

The EEOC has addressed the precise issue raised by the decision below. Specifically, in Question No. 30 of the EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, issued on March 25, 1997, the EEOC poses and answers the following inquiry:

> May an employer discipline an individual with a disability for violating a workplace

conduct standard if the misconduct resulted from a disability?

Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity.

See EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, ("Guidance"), No. 915.002 at Appendix A-26 through A-31. This opinion is followed by the striking example of an employee who steals money from his employer, pointing out that even if the employee asserts that the misconduct was caused by a disability, the employer may discipline the employee consistent with its uniform disciplinary policies. See id.

The EEOC based the above answer,[5] directly responsive to the question presented, on 42 U.S.C. § 12112(b)(6),[6] which proscribes the use of qualification standards and selection criteria that screen out individuals with disabilities "unless the standard . . . or other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity . . . ." The agency's explanation accompanying its final ADA rule states "that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and non-disabled, to the same performance and conduct standards." 56 Fed. Reg. 35,733 (1991) (Emphasis added).

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[5] Neither Teahan nor Petitioner's premise is referenced in the Guidance.

[6] A provision which elevates previous Rehabilitation Act regulation to statutory status.

The equal treatment criteria of the ADA, and regulations and guidance implementing the statute have now been the subject of judicial interpretation in numerous cases which uniformly recognize that the misconduct/disability distinction is one which is to be uniformly applied, and is not confined to the context of alcoholism or the illegal use of drugs. See, e.g., Palmer v. Circuit Court of Cook County, Ill., 117 F.3d 351, 352 (7th Cir. 1997) ("[I]f an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act."). These cases confirm the equal treatment and consistent implementation goals of the ADA. 42 U.S.C. § 12101(b)(2).

CONCLUSION

There is no explicit conflict between the United States Courts of Appeals under the current state of the law. It is submitted that the express language of the ADA, the considered opinion of the EEOC, and the overwhelming weight of judicial authority dictate the result reached in the courts below. For these and the other reasons expressed above, it is urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDICES

Memorandum Opinion, U.S. Court of Appeals for the Sixth Circuit, filed 6/6/97 1-3

Memorandum and Order, U.S. District Court for the Southern District of Ohio, filed 3/31/96 4-25

EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, 3/25/97; Question 30 26-31

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM OPINION

Sixth Circuit Case Nº. 96-3499
Filed June 6, 1997

Pages 1 thru 3

FILED JUNE 6, 1997
LEONARD GREEN, CLERK

NOT RECOMMENDED FOR PUBLICATION

No. 96-3499
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BONNIE LAMVERMEYER,	)	
	)	
Plaintiff-Appellant	)	
	)	**ON APPEAL** FROM THE
	)	UNITED STATES
	)	DISTRICT COURT
v.	)	FOR THE SOUTHERN
	)	DISTRICT OF OHIO
	)	
DENISON UNIVERSITY,	)	
et al.,	)	**MEMORANDUM**
	)	**OPINION**
Defendants-Appellees	)	

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: NELSON and NORRIS, Circuit Judges; COHN, District Judge.[1]

PER CURIAM. Plaintiff, Bonnie Lamvermeyer, appeals from the order of the district court granting summary judgment to defendants. Plaintiff's lawsuit was predicated upon the Americans With Disabilities Act and the Rehabilitation Act of 1973, as well as state law claims.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of

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[1] The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

the parties, we are not persuaded that the district court erred in granting summary judgment to defendants.

Because the reasoning which supports judgment for defendants has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is affirmed upon the reasoning employed by that court in its Memorandum and Order filed on March 31, 1996.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEMORANDUM AND ORDER

Case Nº. C-2-94-46
Filed March 31, 1996

Pages 4 thru 25

FILED MARCH 31, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BONNIE LAMVERMEYER,	:	
	:	
Plaintiff,	:	
	:	Case C-2-94-46
vs.	:	
	:	
DENISON UNIVERSITY,	:	
ET AL.	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Plaintiff Dr. Bonnie Lamvermeyer filed this action following her termination as a tenured professor of biology at Denison University. Plaintiff contends that, in terminating her employment, defendants violated state and federal statutes which prohibit employers from discriminating against individuals with disabilities, breached her employment contract, and caused her severe emotional distress. Jurisdiction is based on the presence of a federal question; there is no diversity of citizenship among the parties. This matter is before the Court on defendants' motion for summary judgment.

I. Background

Plaintiff's employment with Denison University began in 1978, when she was hired as an associate professor of biology. (December 1, 1994 Deposition of Dr. Bonnie Lanvermeyer, pp. 7-8). In the spring of 1984, plaintiff was awarded tenure[1] and promoted to the position of associate professor of biology, a position she held until the date of her termination. (Id.)

At some point during the mid-1980s, plaintiff began to experience emotional problems. (Id. at 48). These problems manifested themselves during the summer of 1985, when plaintiff first experienced what she later learned was a panic attack. (Id.) While plaintiff was walking between the library and the biology department her arms and legs began to tingle, she became very cold, she felt dizzy and faint, her heart began to race, and she could not

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[1] Dr. Michele Myers, President of Denison University, explained that tenure "means that the university is committed to provide a continuous contract to the faculty member unless there is cause to terminate that contract; to not renew that contract. (December 2, 1994 Deposition of Dr. Michele Myers, p. 27). Moral delinquency is one such cause. (Id.)

breathe. (Id.) According to plaintiff, she felt as if she were dying. (Id.) Thereafter, plaintiff experienced many additional panic attacks, some of which occurred while she was teaching class. (Id. at 53-56). When this happened, plaintiff did not excuse the class but rather asked the class to read for a moment while she excused herself. ((Id.) Because of her panic attacks, plaintiff did not teach during the fall semester of 1985, taking medical leave instead. (Id. at 57). Plaintiff resumed teaching in February 1986. (Id. at 90).

Soon after her first panic attack in 1985 plaintiff sought medical treatment from Dr. Siam Giray. (Id. at 55). Dr. Giray gave plaintiff samples of medications, which, according to plaintiff, made her physically sick without improving her panic disorder. (Id. at 57-60). As a result, plaintiff stopped seeing Dr. Giray and instead sought treatment from Dr. Brian Glynn, a psychiatrist whom Dr. Janet Hyde, then university provost, had recommended. (Id. at 72). Dr. Glynn treated plaintiff for twenty months, from August 1985 until March 1987, during which time plaintiff took Nardil and Xanax, drugs prescribed by Dr. Glynn to treat the physical manifestations of her panic attacks. (Id. at 73-82).

As of March 1987, plaintiff was no longer having panic attacks and was no longer taking Nardil or Xanax. (Id. at 92). Plaintiff was asymptomatic until sometime around 1990, when her panic attacks resumed. (Id. at 95-97). For approximately the next two years she saw Dr. Eric Kahn (she did not go back to Dr. Glynn because he was preparing to leave the area), a psychiatrist who treated her with psychotherapy and the drugs Xanax, Nardil, and Lithium. (Id. at 113, 114, 115, 119, 123). Dr. Kahn prescribed Lithium even though it traditionally had not been used to treat panic attacks because plaintiff was not responding to Xanax or Nardil. (Id. at 133). The Lithium caused plaintiff to have difficulty thinking--she testified that "[i]t was like I was trying to think through a fog." (Id. 134). She experienced other severe side effects as well, such as loss of speech and her ability to use one side of her body, and, as a result, she stopped using Lithium about one year after she began to use it. (Id. at 133-34). The panic attacks continued while plaintiff was under the care of Dr. Kahn. (Id. at 123). The symptoms were the same as before, but the attacks lasted longer. (Id. at 125). Despite this, plaintiff still carried a full teaching load. (Id. at 136). Plaintiff was able to teach, although she was shaky and weak after each panic attack and had difficulty grading papers and writing letters of recommendation on behalf of students. (Id. at 126, 138).

Sometime after July or August 1992, plaintiff stopped seeing Dr. Kahn. (Id. at 144). In the fall of 1992, plaintiff began treatment with Dr. Steven Gemma, who prescribed progressively smaller doses of Xanax and a new drug, Zoloft. (Id. at 151). Eventually, plaintiff stopped taking Xanax and her panic attacks were brought under control. After seeing Dr. Gemma, plaintiff did not experience any full-blown panic attacks or symptoms of emotional or psychiatric problems. (Id. at 156-57).

During the time plaintiff was experiencing panic attacks, an issue arose concerning certain requests for reimbursement she had submitted. At some point prior to July 31, 1992, Dr. Charles Morris, provost of the university,[2] who knew that plaintiff had been having emotional problems, called plaintiff and asked to meet with her. (Id. at 162; December 2, 1994 Deposition of Dr. Charles Morris, p. 10). Dr. Morris requested the meeting because he had learned from the university's vice-president of finance that plaintiff had sought reimbursement for expenses that she may not have incurred. (December 2,

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[2] Dr. Morris described the provost as the chief academic officer of a college, responsible primarily for the curriculum, the academic program, and personnel policies but also involved in other areas such as strategic planning and student life. (December 2, 1994 Deposition of Dr. Charles Morris, p. 7).

1994 Deposition of Dr. Charles Morris, pp. 12-14). A meeting was held on July 31, 1992, at which time plaintiff and Dr. Morris discussed the matter. (December 1, 1994 Deposition of Dr. Bonnie Lamvermeyer, p. 167). At this meeting plaintiff saw copies of her requests for reimbursements and accompanying supporting documents, and, although she recognized certain items that had been purchased, she could not recall how the documents came to exist. (Id. at 167, 175).

Thereafter, the university began formal proceedings against plaintiff, notifying her in a letter dated December 1, 1992 from Dr. Michele Myers, president of the university, that a hearing would be held on a charge of moral delinquency pursuant to the procedure set forth in the University Faculty Handbook. (December 1, 1992 letter from Dr. Myers, Exhibit B to Defendants' Motion for Summary Judgment). The letter informed plaintiff that the moral delinquency charge related to her submission of "false expense vouchers for which you received University monies." (Id.) The letter also listed the eight requests for payment submitted by plaintiff and explained why, in the opinion of the university, the vouchers supporting the requests were false. (Id.)

A hearing was held on May 6, 1993 before a panel comprised of members of the faculty. (May 7, 1993 letter to Dr. Myers, Exhibit E to Defendants' Motion for Summary Judgment). Plaintiff was represented by counsel at this hearing. The next day, after meeting again, the panel members recommended in a letter to Dr. Myers that plaintiff's employment be terminated. (Id.) The panel members arrived at the following conclusions:

> - We conclude that Professor Lamvermeyer did submit false expense vouchers for which she received University monies.
>
> - We conclude that these submissions constitute acts of moral delinquency.
>
> - We are not persuaded that her disability and/or medication significantly impaired her ability to make moral judgments. Therefore, we conclude that she is morally responsible for these actions.

(Id.)

In a letter dated May 14, 1993, Dr. Myers informed plaintiff: "I concur with the Panel that you are guilty of the

moral delinquency charges brought against you and that your employment should be terminated." (May 14, 1993 letter to plaintiff, Exhibit F to Defendants' Motion for Summary Judgment). Plaintiff refused an opportunity to resign her employment and instead asked to meet with the Board of Trustee's Executive Committee to restate her position. (May 27, 1993 letter from counsel for plaintiff to counsel for defendant, Exhibit G to Defendants' Motion for Summary Judgment). In making this request for plaintiff, counsel for plaintiff stated that plaintiff "strongly believes that she was not responsible for any falsification of receipts[,] and the expert witnesses support her position. (Id.) On June 29, 1993, the Executive Committee affirmed the hearing panel's recommendation to terminate plaintiff. (June 29, 1993 letter to Dr. Myers, Exhibit H to Defendants' Motion for Summary Judgment). Plaintiff asked the Executive Committee to reconsider its June 29, 1993 decision. (October 18, 1993 letter to plaintiff and her counsel, Exhibit I to Defendants' Motion for Summary Judgment). Both plaintiff and special counsel for the university addressed the Executive Committee in regard to plaintiff's request for reconsideration. (Id.) Thereafter, the Executive Committee unanimously concluded that there was not a sufficient reason to reconsider its earlier decision or the recommendations of the panel and Dr. Myers, and plaintiff's request for reconsideration was therefore denied. (Id.)

Dr. Myers and plaintiff's colleagues knew that plaintiff had experienced a number of panic attacks while employed at Denison University. (December 2, 1994 Deposition of Dr. Michele Myers, p.24). Dr. Myers also knew that accommodations had been made to assist plaintiff with her teaching. (Id.). Dr. Myers testified:

> From the time that she was tenured at Denison, there were times when she was unable to perform her teaching duties and faculty members in that department, colleagues of Dr. Lamvermeyer's, were asked at times to assist, cover classes for her; some students were asked to get books from the library for her when she couldn't leave her office because she had a panic attack. And all of these accommodations were made for several years during -- long before we got into this situation.

(Id. at 23-24). When asked why the university did not make any accommodations at the time of plaintiff's termination, Dr. Myers testified that "[t]he termination had nothing to do with the disability

from my point of view. The termination had to do with moral delinquency and behaviors that were unacceptable to the university." (Id. at 25).

On January 18, 1994, plaintiff filed suit against Denison University and the members of its board of trustees. Plaintiff alleges that, in terminating her employment for the reason given, defendants discriminated against her on the basis of her disability or handicap, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 (first claim for relief), the Rehabilitation Act of 1973, 29 U.S.C. § 794 (second claim for relief), and section 4112.99 of the Ohio Revised Code (third claim for relief). Plaintiff also alleges that defendants breached her employment contract (fourth claim for relief) and that defendants intentionally, recklessly, or negligently caused her severe emotional distress (fifth claim for relief). Plaintiff seeks damages and equitable relief, including reinstatement to her former position with backpay.

Plaintiff strongly asserts that she never intended to defraud the university. She contends--and her expert witnesses agree--that the medication she was taking to control her panic disorder caused her to create inaccurate information on the vouchers she

submitted to the university. One of plaintiff's expert witnesses, Dr. Peter Breggin, concluded that plaintiff was intoxicated by the drug Xanax, a condition evidenced by confusion, amnesia, impaired judgment, loss of impulse control, denial, and confabulation. Plaintiff also contends that almost all of the expenses for which she sought reimbursement were actually incurred and that she can demonstrate this. And she argues that other professors had made similar mistakes on their vouchers but that no action was taken against them.

Nevertheless, plaintiff does not deny that she submitted inaccurate expense vouchers. For example, on June 26, 1991, she submitted a request to be reimbursed for expenses incurred during a trip she took to Atlanta to attend a conference. According to the request form, expenses for lodging at "Almost Home," a private tourist home said to be owned by a woman named Beatrice Tuttle, totalled $200. Supporting this request were four receipts, each showing room charges of $50 and each apparently signed by Beatrice Tuttle. Plaintiff was asked about this in her deposition:

Q. Have you ever heard of a private tourist home called Almost Home?

A. No, I tried to find that in library records and I can't find anything like that.

Q. Did you come to find out that no such place exists?

A. That is my conclusion.

Q. This is very detailed information; would you agree? It has a specific name, the specific owner, the specific date, the specific person, the specific customer identification. All that is very specific information; would you agree?

A. That information is there.

Q. I mean it is not ambiguous as to the details on these invoices.

A. That's correct.

Q. Do you deny creating those invoices to submit with your -

A. I cannot confirm or deny. I don't know.

(December 1, 1994 Deposition of Dr. Bonnie Lamvermeyer, pp. 270-71). The seven other requests for payment that

formed the basis for plaintiff's termination contained similar discrepancies, which plaintiff could not explain.[3]

II. Legal Standard Government Defendants' Motions

Motions for summary judgment are governed by Fed. R. Civ. P. 56(c), which provides:

> [Summary judgment]...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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[3] Plaintiff did testify at her deposition, however, that the signatures on eight documents labelled "Request for Payment" and prepared during the period from June 26, 1991 through June 3, 1992 (the documents at issue in regard to her termination) were hers or appeared to be hers. (December 1, 1994 Deposition of Dr. Bonnie Lamvermeyer, pp. 180, 192, 199, 222, 228, 235, 241, 245; exhibits 1-8).

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247-48 (1986)(emphasis in original); Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984).

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. The purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. Lashlee v. Sumner, 570 F.2d 107, 111 (6th Cir. 1978). Therefore, summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is...[and where] no genuine issue remains for trial,...[for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 467 (1962) (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944)); accord County of Oakland v. City of Berkley, 742 F.2d 289, 297 (6th Cir. 1984).

In making this inquiry, the standard to be applied by the Court mirrors the standard for what was formerly referred to as a directed verdict. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson, 477 U.S. at 250.

> "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." Bill Johnson's Restaurants. Inc. v. NLRB, 461 U.S. 731, 745, n.ll (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules, which are designed "to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted); accord Adams v. Union Carbide Corp., 737 F.2d 1453, 1455-56 (6th Cir.), cert. denied, 469 U.S. 1062 (1984). Inferences to be drawn from the underlying facts contained in such materials must also be considered in the light most favorable to the party opposing the motion. United States v. Diebold. Inc., 369 U.S. 654, 655 (1962); Watkins v. Northwestern Ohio Tractor Pullers Ass'n, 630 F.2d 1155, 1158 (6th Cir. 1980). Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes, 398 U.S. at 157-60.

If the moving party meets its burden and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The

existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 252.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

III. Discussion

To establish a violation of the Rehabilitation Act of 1973, plaintiff must show, among other things, that she was discriminated against solely by reason of her handicap. Maddox v. University of Tennessee, 62 F.3d 843, 846 (6th Cir. 1995).[4] Likewise, because the Americans with

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[4] Plaintiff must also show that she is a handicapped person under the Act, that she is otherwise qualified for the position of

Disabilities Act "parallels the protection of the Rehabilitation Act," Maddox, 62 F.3d at 846 n.2, plaintiff must also show under the Americans with Disabilities Act that she was terminated solely by reason of her disability. For the reasons set forth below, the Court determines that there is no genuine issue of material fact concerning whether plaintiff was terminated solely by reason of her handicap or disability.

It is undisputed that plaintiff was found to have engaged in misconduct which, in the opinion of the university's board of trustees, was sufficiently egregious to warrant her termination. It is also undisputed that the board of trustees terminated plaintiff on the basis of its finding of misconduct. As a result, plaintiff cannot demonstrate that defendants terminated her employment solely by reason of her handicap or disability. Defendants are thus entitled to summary judgment on plaintiff's claims under the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

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associate professor of biology, and that Denison University was receiving federal financial assistance. Maddox, 62 F.3d at 846.

The Court's conclusion on this issue is based on the decisions of the Sixth Circuit in Maddox and Ferby v. United States Postal Service, No. 94-5792, 1995 U.S. App. LEXIS 37079 (6th Cir. Nov. 27, 1995). In Maddox, plaintiff, a former assistant football coach at the University of Tennessee (UT), alleged that he was terminated on the basis of his disability, alcoholism, in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. While employed at UT, plaintiff was arrested and charged with driving under the influence of alcohol. This incident, which was highly publicized, was embarrassing to UT. As a result, after determining that the allegations against plaintiff were accurate, UT notified plaintiff that his employment was terminated. Plaintiff sued UT, contending that his termination was discriminatory on the basis of his alcoholism. There was no dispute, however, that plaintiff had been terminated because of his misconduct. The district court therefore held that UT did not terminate plaintiff solely by reason of his disability, and granted summary judgment in favor of defendants.

The Sixth Circuit stated that the district court was correct in focusing on the distinction between discharging a person for unacceptable misconduct allegedly caused by

his or her disability and discharging the person because of his or her disability. The court then affirmed the grant of summary judgment in favor of defendants, holding that "[e]mployers subject to the Rehabilitation Act and ADA must be permitted to take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled." Maddox, 62 F.3d at 848. In so holding, the court expressly rejected the reasoning of the Second Circuit in Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991), cert. denied, 113 S.Ct. 54 (1992), a decision relied upon by plaintiff in opposing defendants' motion for summary judgment.

The Sixth Circuit subsequently reaffirmed its position that a distinction must be made between conduct and disability. In Ferby, plaintiff, an alcoholic, was terminated following a violent outburst at work, an outburst which, plaintiff contended, was caused by his alcoholism. Plaintiff sued under the Rehabilitation Act of 1973 after his request for reinstatement was denied. The only question was whether plaintiff was denied reinstatement "solely by reason of his handicap," in violation of the Rehabilitation Act. Answering this question in the negative, the Sixth Circuit held that "[a]n employer does not rely solely on the handicap when it demonstrates that a person is discharged for misconduct, even if the conduct is related to a handicap." Ferby, 1995 U.S. App. LEXIS at *3.

In the present case, there is no dispute that defendants terminated plaintiff for what they determined to be misconduct in connection with certain requests for payment made by her. Under the decisions in Maddox and Ferby, even if plaintiff's conduct was caused by her disability, her termination was not discriminatory under the Americans with Disabilities Act or the Rehabilitation Act of 1973. Defendants, therefore, are entitled to summary judgment on these claims.

IV. Conclusion

The Court GRANTS defendants' motion for summary judgment with respect to plaintiff's claims under the Americans with Disabilities Act and the Rehabilitation Act of 1973, the only claims under federal law presented in this action, and DISMISSES the pendent state-law claims without prejudice. See Gaff v. Federal Deposit Insurance Corp., 814 F.2d 311, 319 (6th Cir. 1987) (as a general rule, when federal issues are dismissed before trial, district courts should decline to exercise pendent jurisdiction over state law claims).

IT IS SO ORDERED.

/s John D. Holschuh
John D. Holschuh, Judge
United States District Court

APPENDIX

EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, 3/25/97; Question 3

Pages 26 thru 31

EEOC Guidance On Psychiatric Disabilities And the Americans With Disabilities Act

EEOC	NOTICE	Number 915.002 Date 3/25/97

1. *SUBJECT*: EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.

2. PURPOSE: This enforcement guidance sets forth the Commission's position on the application of Title I of the Americans with Disabilities Act of 1990 to individuals with psychiatric disabilities.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5),

this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: ADA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

Date 3-25-97

/S/ Gilbert F. Casellas
Chairman

. . .

30. May an employer discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability?

Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity.[7] For example, nothing in the ADA

[7] 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. § 1630.10, .15(c) (1996).

prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.[8] Other conduct standards, however, may not be job-related for the

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[8] *See* EEOC Compliance Manual § 902.2, n.11, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7259, n.11 (1995) (an employer "does not have to excuse . . . misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees"); *see* 56 Fed. Reg. 35,733 (1991) (referring to revisions to proposed ADA rule that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards").

position in question and consistent with business necessity. If they are not, imposing discipline under them could violate the ADA.

Example A: An employee steals money from his employer. Even if he asserts that his misconduct was caused by a disability, the employer may discipline him consistent with its uniform disciplinary policies because the individual violated a conduct standard -- a prohibition against employee theft -- that is job-related for the position in question and consistent with business necessity.

Example B: An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard -- a rule prohibiting intentional damage to equipment -- that

is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.

Example C: An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact with and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The

employer's company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability which was exacerbated during this time period.

The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.